that he did it quite recklessly not caring whether it was the right or wrong thing to do, quite regardless of the results of what he was doing.

Section 106 of the Evidence Ordinance, 1950 provides that the burden of proving any fact which is "especially within the knowledge of any person" is upon him and under section 114, Illustration (g), the court may presume "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it." However, because he has specifically undertaken to do so the burden of proving wilful misconduct in a special condition relating to a contract of carriage "at owner's risk" is on the plaintiffs even though the matter is especially within the knowledge of the defendant and no adverse inference could therefore be made on the failure of the defendant to produce any evidence on it.

In *Forder* v. *Great Western Railway Company* where the plaintiff sent a parcel of sheepskins on the terms of an "owners' risk" note whereby he relieved the defendants from liability for damages except upon proof that it arose from wilful misconduct on the part of the defendants' servants Kennedy J. at page 536 said:

"By the terms of the consignment note the onus of proof, upon the issue whether the damage arose from wilful misconduct on the part of the company's servants, is cast upon the plaintiff."

In *H. C. Smith, Ltd.* v. *Great Western Railway Company*[3] it was held that the refusal of the defendants to account for the loss of the goods was not evidence which justified the court in inferring that the loss arose from the wilful misconduct of the defendant's servants and Lord Buckmaster said in the course of his judgment at page 183:

"The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken, and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the railway company."

The plaintiffs' assertions that the onions were perishable goods and that most of them had become rotten when they arrived at Pasir Mas because they had been sent by the slow goods train and that such train would even in normal circumstances take seven days or more to reach Pasir Mas from Bukit Tengah were not disputed and from the evidence produced by the plaintiffs it is in my view reasonable to infer that CG4243 had been taken from Bukit Tengah to Taiping by the fast goods train and that it had the usual green labels attached to its sides on which were stated that onions were carried therein and the date of loading with the word "perishable" embossed across them in black, that the defendants' servant at Taiping responsible for it had seen the labels and therefore knew that the CG had to be sent to Pasir Mas expeditiously by a fast goods train and that such a train was available on the day in question. P.W. 1's contention that he knew that onions carried in a sealed CG would rot after seven days had not been challenged when he was cross-examined and the defendants' contention in paragraph 3 of their letter at page 5 of A that their station staff "thought" that the onions could withstand the long journey by the slow goods train showed that the staff concerned was not certain whether he had done the right or the wrong thing.

In the surrounding circumstances of this case I find that wilful misconduct has been proved against the defendants' servant at Taiping when he forwarded CG 4243 containing the onions from Taiping by a slow goods train. I am satisfied that when he did so he had, at the least, acted recklessly, quite regardless of whether the onions would rot or not — that with an indifference to his duty he had not cared to ascertain whether what he did was the right or the wrong thing to do.

The amount of damages claimed has not been disputed and I therefore give judgment for the plaintiffs in the sum of $5,353 with interest at 6% on the sum of $4,840 from 17th February 1967 and costs.

Judgment for the plaintiff.

Solicitors: *Wilson & Co.; Skrine & Co.*

PUBLIC PROSECUTOR v. THE STRAITS TIMES (MALAYA) BHD.

[O.Cr.J. (Abdul Hamid J.) September 8, 1970]

[Kuala Lumpur — Criminal Application No. 18 of 1970]

Criminal Law and Procedure — Contempt of court — Application for writ of attachment for — Application ex parte — Whether proper procedure — R.S.C. 1957, O. 44, r. 2 — Courts of Judicature Act, 1964, s. 13.

This was an *ex parte* originating motion brought by the Public Prosecutor for an order that the applicant be at liberty to issue writ or writs of attachment against the respondents for alleged contempts of court.

Held: the proceeding by way of *ex parte* application for leave to issue a writ of attachment for contempt is not the proper procedure to be adopted. Notice of the application should be served on the respondents.

[Editorial Note: In pursuance to this order, the notice of application was duly served on the respondents and the matter came again before the same learned judge who after hearing the parties dismissed the application on October 9, 1970. That judgment is reported at page 67 *ante*. The judgment now reported was received by us subsequently.]

Cases referred to:-

(1) *In re H.E. Kingdon* v. *S.C. Goho* [1948] M.L.J. 17.

(2) *Re Run Run Shaw and Runme Shaw, ex parte Republic Pictures International Corporation* [1949] M.L.J. Supp. 16.

(3) *Public Prosecutor* v. *Abdul Samad* [1953] M.L.J. 118.

(4) *Public Prosecutor* v. *Straits Times Press Ltd.* [1949] M.L.J. 81.

Ex Parte ORIGINATING MOTION.

Mokhtar Sidin (Deputy Public Prosecutor) for the applicant.

Abdul Hamid J.: This is an *ex-parte* originating motion brought by the Public Prosecutor asking for an order that —

"The applicant be at liberty to issue writ or writs of attachment against the Straits Times (M) Berhad for their several contempts of this Court in publishing in the issue of the newspapers known as The Straits Times for the 25th, 26th and 27th day of August, 1970, articles under the headings of 'Assault on Engineer; I.G.P. Orders Probe', 'To save Robert's life' and 'Engineer hurt in bar assault dies in hospital' respectively and the said Editor do pay to the applicant his costs of and occasioned by these proceedings."

The grounds upon which the relief is sought are that the publication of the said articles contain matters which are tendencious and constitute contempt of court because they were prejudicing and embarrassing the applicant in the exercise of his statutory functions and prejudicing a fair trial concerning the circumstances of the death of one Robert Lee.

I do not propose at this stage to go into the merits of this application as it would seem to this court that the proceedings by way of *ex parte* originating motion is not the proper procedure to be adopted.

I have examined two Singapore cases where application was made for leave to issue writs of attachment for contempt and in both these cases *In re H. E. Kingdon* v. *S. C. Goho*[1] and *Re Run Run Shaw and Runme Shaw, ex parte Republic Pictures International Corporation*[2] the respondents were served with the notice.

My attention is drawn to *Public Prosecutor* v. *Abdul Samad*[3] a Malayan case where Briggs J. expressed the view that the matter is neither criminal nor civil in the ordinary sense and that the proceedings by way of *ex parte* was the correct procedure. In that case, he referred to *Public Prosecutor* v. *Straits Times Press Ltd.*[4] There however, the respondent was served before the application for rule *nisi*. Briggs J. was of the opinion that the procedure adopted in that case was wrong. In coming to the conclusion that the correct procedure to be adopted was by way of *ex parte*, Briggs J. found that the matter forms part of the special jurisdiction of the court conferred by paragraph 1 of Part A of the Second Schedule to the Courts Ordinance, 1948. He also expressed the view that if the matter were purely civil the procedure would presumably be by originating summons under section 472 of the Civil Procedure Code.

I do not propose to comment on the correctness or incorrectness of that decision. It has to be remembered however that the Civil Procedure Code has since been repealed and replaced by the Rules of Supreme Court and Part A of the Second Schedule to the Courts Ordinance, 1948 has also been repealed. While the Courts of Judicature Act, 1964 makes provision under section 13 that —

"Every High Court shall have power to punish any contempt of itself."

certain additional powers of the High Courts were given in the First Schedule. Provision similar to paragraph 1 of Part A no longer appears. In any event, under paragraph 1 of the First Schedule, it would seem that the High Court is given the power to issue to any person writs including writs in the nature of *habeas corpus*, *mandamus* etc. The proviso to subsection (ii) however provides that those additional powers shall be exercised in accordance with the rules of law or rules of court relating to the same. In my opinion, the only written law or rules of court relating to writs of attachment for contempt would be Order 44 of the Rules of the Supreme Court and under r.2, it is provided that —

"No writ of attachment shall be issued without leave of a court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued."

It seems to me that proceedings by way of *ex parte* application for leave to issue writs of attachment for contempt is not the proper procedure to be adopted.

Notice of the motion shall be served on the respondents.

Order accordingly.

LAU CHER HIAN v. COLLECTOR OF LAND REVENUE, MUAR

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.)
September 19, 1970]

[Johore Bahru — Federal Court Civil Appeal No. X.111 of 1969]

Land Laws — Acquisition — Compensation — Offer of collector not accepted — Written objection to be made within six weeks of receipt of notice of award — Application for extension of time — Special grounds — Land Acquisition Act, 1960, ss. 38(3) & (4) and 44(2).

Practice and Procedure — Enlargement of time — Special grounds.

The appellant owned an undivided half interest in a piece of rubber land which was compulsorily acquired by the Government. A notice of award and offer of compensation was served on the appellant in February 1969 and she immediately notified the collector that she did not accept the offer of compensation. Her brother who owned the other half interest was not served with the notice till April 1969. The appellant was waiting to consult her brother on a common line of action after he was served. She then found that the period of 6 weeks provided for the making of the written objection had expired and she applied for extension of time. The notice served on her contained no reference to the requirement for the written objection to be filed within six weeks. Her application was refused and she appealed to the Federal Court.

Held, allowing the appeal: (1) as there was hardship caused in this case to a party who was not in the least at fault, there were special grounds which justified the court in enlarging the time;

(2) there was further the possibility of an adjustment of the appellant's claim by reason of the award to her brother and this too was a material fact to be considered by the court in granting the application.

Per Ong C.J. (Malaya): "When a landowner is to be dispossessed, albeit with compensation, natural justice demands that he should be heard, unless by his own conduct he disentitles himself to such treatment. That, I believe, to be the reason why the court is given a discretion to temper the rigidity of the law. 'Special grounds' were not defined